

**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR.**

JUDGMENT.

Smt. Jumli
& ors.

vs.

Ratan Lal
& ors.

S.B. Civil Second Appeal No.72/86 against the
judgment and decree dated 14.12.1985 passed by the
learned Additional District Judge, Rajsamand in Civil
Regular Appeal No.19/1983.

Date of Judgment:

March 20, 2006.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

Mr. M.S. Singhvi and Mr. Rajat Dave for the appellants.
None present for the respondents.

BY THE COURT:

Heard learned counsel for the appellants.

The appellants are aggrieved against the judgment and decree of the trial court dated 3.5.1983 by which appellants' suit was dismissed by the trial court and also aggrieved against the judgment and decree of the first appellate court dated 14.12.1985 by which appellants' appeal was dismissed.

Brief facts of the case are that the plaintiff filed the suit for cancellation of sale-deed dated 17.9.1969 executed by defendant no.1 in favour of defendant no.2-respondent for a consideration of Rs.2800/-

and for declaration of the transaction dated 19.7.1966 to be mortgage and not sale. The plaintiff further prayed for specific performance of the contract of the same date, i.e., 19.7.1966 by which according to the plaintiff, the defendant agreed to sell the same property to plaintiff. The plaintiff also prayed decree for possession. According to the plaintiff, defendant no.1-Udai Ram's (now deceased, father of defendants no.1 to 7) some money was due in Noor Mohd. (plaintiff No.3-appellant No.2). The account was settled and a sum of Rs.2500/- was found due as on 19.7.1966 in Noor Mohd.. In part payment of the said debt, Allabux, father of Noor Mohd. executed purported sale deed in favour of said Udai Ram on 19.7.1966. According to the plaintiffs, though the deed has been styled as sale-deed but in fact it was a mortgage by conditional sale. It is also pleaded that said Allabux had no intention to sell his house nor the defendant Udai Ram had any idea to purchase the said property. In fact the defendant sought security for his sum of Rs.1500/- and, therefore, an ostensible sale-deed was executed. It is submitted that on the same day, i.e. on 19.7.1966, an agreement was executed in favour of plaintiff No.1 Allabux by the said purchaser Udai Ram that on payment of Rs.1500/- by 18.11.1966, the house will be re-transferred in favour of plaintiff No.1 to Allabux. On these facts, the plaintiffs sought the reliefs mentioned above. The suit property was further sold by defendant no.1 to defendant no.2 on 17.9.1969 by

registered sale-deed. Therefore, subsequent purchaser is also impleaded as party defendant in the suit.. Before filing the suit, registered notice was served by the plaintiff upon defendant no.1.

Defendants no.1 and 2 contested the suit by filing a separate written statement and denied the facts as alleged by the plaintiff. Defendant no.1 stated that he purchased the house for a consideration of Rs.2500/- and he became owner of the property. However, he admitted execution of the agreement for re-sale of the house. It is pleaded that Allabux never shown his interest to purchase the said house and did not pay the amount in stipulated period, therefore, after some time, he sold the house to defendant no.2.

The trial court dismissed the suit of the plaintiff on 3.5.1983 after holding that the sale-deed executed in favour of defendant no.1 is not a mortgage by conditional sale. The trial court also dismissed the alternate prayer for specific performance of the contract. Therefore, the plaintiffs preferred the appeal. The appellate court also after considering the facts in detail and the law on the point, dismissed the appeal. Hence this second appeal.

The appeal was admitted on 21.9.1987 but without framing any substantial question of law. Therefore, heard the learned counsel for the appellants on merits as well as to find out whether any substantial question of law arises in this case or not ?

According to the learned counsel for the appellants, two deeds were executed on the same day, i.e. on 19.7.1966, is an admitted fact. The alleged sale-deed was executed because of the settlement of account and there was neither any intention nor any reason for selling house by the said Allabux to defendant Udai Ram which finds support from the fact that the seller executed the agreement for re-sale of the property to the vendor on the same day. In view of the above, the purported sale-deed is nothing but only a mortgage by conditional sale and in fact the deed was executed for securing the amount of defendant no.1. It is also submitted that though there no is condition mentioned in the sale-deed dated 19.7.1966 for re-conveying the property to the vendor on payment of money by the vendee but that has been done by separately executing the agreement between the parties and that agreement is not in dispute, rather is admitted by defendant no.1 himself.

It is also submitted that in the alternative, the plaintiff-appellants prayed that the plaintiff-appellants are entitled to specifically enforce the agreement dated 19.7.1966 by which they are entitled to get the sale-deed registered in their favour as well as are entitled to take possession through the court of law. The learned counsel for the appellants also referred to said two documents of the same day, i.e. Sale-deed dated 19.7.1966 and the agreement dated

19.7.1966.

I considered the submissions of the learned counsel for the appellants and perused the record also.

At the out set, it can be said that the sale-deed dated 19.7.1966 is unambiguously a sale-deed and there is no condition incorporated in the sale-deed itself about re-conveyance of the property by the vendee to vendor in any circumstance. Therefore, the sale-deed cannot be held to be a mortgage-deed. Sub-section (c) of Section 58 of the Transfer of Property Act, 1882 is very clear which deals with the Mortgage by conditional sale. Sub-section (c) of Section 58 is as under:-

“Sec. 58(c) **Mortgage by conditional sale.**- Where the mortgagor ostensibly sells the mortgages property-

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

On condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.”

Therefore, in view of the above specific provision of law and in

view of the fact that the condition is not embodied in the document in question by putting an obligation upon the buyer to transfer the property to seller on payment being made by the buyer as agreed by the seller, the document is clearly not a mortgage by conditional sale.

So far as seeking specific performance of the contract dated 19.7.1966 is concerned, there is no pleading of the plaintiff in the plaint that he was ready and willing to perform his part of the contract. Not only this but from the tenure of the language used in the plaint, it is clear that under the circumstances pleaded by the plaintiff, he could not have been ready and willing to purchase the property in pursuance of the agreement dated 19.7.1966 as his claim was that he was entitled to re-deem the property. Apart from it, the two courts below held that suit for specific performance of the contract cannot be decreed and now more than 39 years have passed from the time of agreement, therefore, now it will be inequitable to grant any decree apart from the fact that from the facts, no case is made out for the decree for specific performance of the contract dated 19.7.1966. Therefore, no substantial question of law is involved in this appeal.

The appeal of the appellants is, therefore, dismissed.

(PRAKASH TATIA),J.

mlt.